

Issue: Group III Written Notice with Termination (conduct unbecoming a State employee); Hearing Date: 05/30/02; Decision Date: 05/31/02; Agency: Dept. of Juvenile Justice; AHO: Carl Wilson Schmidt, Esquire; Case No.: 5437;
Administrative Review: Hearing Officer Reconsideration Request received 06/10/02; Reconsideration Decision Date: 06/17/02; Outcome: No newly discovered evidence or incorrect legal conclusions. Request denied; Judicial Review: Appealed to the Circuit Court in the County of Powhatan on 06/16/02; Outcome pending



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5437

Hearing Date: May 30, 2002
Decision Issued: May 31, 2002

PROCEDURAL HISTORY

On March 26, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Based upon an arrest in Chesterfield County for conduct unbecoming of a State employee, your employment is being terminated.

On March 27, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 25, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 30, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Attorney
Agency Party Designee
Legal Assistant Advocate
Police Officer

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Juvenile Justice employed Grievant as a Juvenile Correctional Officer Senior until his removal on March 26, 2002. The objective of his position is: "To ensure the protection of the citizens of the Commonwealth by providing supervision and security to juvenile offenders and implement treatment programs that offer opportunities for reform." He began working for the Agency in 1999 as a Juvenile Correctional Officer and was promoted to Juvenile Correctional Officer Senior approximately a year later. His job performance was described as "excellent."

On January 18, 2002, a Police Officer filed a report describing her encounter with Grievant as follows:

On today's date, I observed a tan vehicle traveling westbound on Robious Rd with several items hanging from the rear view mirror. I stopped the vehicle on Sturbridge Rd in which I found the driver to be a [Grievant] who came back suspended. I ran my canine jade on the vehicle and [Grievant], at which time he alerted to [Grievant]. A search of [Grievant], nothing was found. A search of the vehicle, I located several small residues of marijuana, at which time I asked [Grievant] when [was] the last time he smoked pot? He stated two weeks prior. I continued to search the vehicle and the back seat. I found a black leather jacket, size 3X. As soon as I started to pick the coat up. [Grievant] stated that [it] was not his coat, it was one of his boy's. In the front pocket of the black leather jacket I located an ounce of marijuana in a clear plastic bag in his top pocket of the coat. I located a white bank envelope with the name [Grievant] on it.¹

¹ The envelope did not contain marijuana. Marijuana was in a plastic bag in another pocket and scattered on the floor of the vehicle.

[Grievant] was arrested for possession of marijuana. Court date 031402 in General District Court. Evidence was placed into property. Upon further discussion with [Grievant] he stated the coat belonged to his best friend that he had [known] since they were seven, however, he could not provide a name.

The substance in the bag was tested by the Division of Forensic Science and determined to be 11.7 grams (0.41 ounce) of marijuana. The Police Officer described this as a small amount of marijuana.

Grievant appeared in General District Court and pled guilty to possession of drug paraphernalia.² He is scheduled to reappear in court in September 2002 and if he meets the conditions of the plea agreement,³ the matter will be dropped and he will not have any criminal conviction on his record.

Within a week of Grievant's arrest, the Agency tested Grievant for illegal drugs in his body. The test was negative. Prior to the arrest, Grievant had been randomly selected and tested for illegal drugs. Each test was negative.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." P&PM § 1.60(V)(B).⁴ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

Violation of DHRM Policy 1.05, Alcohol and Other Drugs, can be a Group I, Group II, or Group III offense depending on the nature of the violation. DHRM Policy 1.05 states in relevant part:

Each of the following constitutes a violation of this policy:

² Unknown to Grievant, he was driving while his driver's license had been suspended. The Police Officer did not charge him with driving on a suspended license and the Agency did not discipline him for failure to have valid driver's license.

³ One of the conditions Grievant must meet is to be subject to weekly random drug tests.

⁴ The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM) setting forth Standards of Conduct for State employees.

- A. The unlawful or unauthorized manufacture, distribution, dispensation, possession, or use of alcohol or other drugs in the workplace;
- B. Impairment in the workplace from the use of alcohol or other drugs, except from the use of drugs for legitimate medical purposes;
- C. A criminal conviction for a:
 - 1. violation of any criminal drug law, based upon conduct occurring either on or off the workplace; or
 - 2. violation of any alcohol beverage control law or law that governs driving while intoxicated, based upon conduct occurring in the workplace; and
- D. An employee's failure to report to his or her supervisor the employee's conviction of any offense, as required in section III(B) above.

The policy defines "Conviction" as:

A finding of guilty (including a plea of guilty or nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility of determining violations of the federal or state criminal drug laws, alcohol beverage control laws, or laws that govern driving while intoxicated.

The policy defines "Criminal drug law" as:

Any criminal law governing the manufacture, distribution, dispensation, use, or possession of any controlled drug.

Grievant did not violate paragraphs A or B of DHRM Policy 1.05 because he did not use drugs in the workplace. Although Grievant was in possession of a controlled drug (e.g. marijuana), he was not convicted of possession of a controlled drug. Drug paraphernalia is not a controlled drug. Thus, Grievant did not violate paragraph C of DHRM Policy 1.05. He also did not violate paragraph D because the Agency learned of his actions shortly after arrest and before any conviction.

The Agency contends Grievant's behavior constitutes conduct unbecoming a State employee thereby justifying issuance of a Group III Written Notice.⁵ This argument fails. The Department of Human Resource Management has drafted a policy specifically addressing alcohol and drug use by State employees. Whether intended or not, the policy draws a distinction between possession of drugs in the workplace and possession of drugs outside of the workplace. If the possession occurs in the

⁵ DHRM Policy 1.60 lists offenses constituting Group offenses, but that list is not all inclusive. See, P&PM § 1.60(V)(A). Violation of DHRM Policy 1.05 can be a Group I, II, or III offense depending on the nature of the violation. In those instances where DHRM has carefully considered the subject matter, such as for alcohol and drug use, the Hearing Officer is less likely to conclude that certain behavior "undermines the effectiveness of agencies' activities" and that disciplinary action is appropriate.

workplace, a criminal conviction is not needed. If the possession occurs outside of the workplace, a criminal conviction for possession is necessary for disciplinary action. If the Hearing Officer were to conclude that disciplinary action should be taken against an employee in possession of drugs outside of the workplace but without a criminal conviction for drug possession, the Hearing Officer would be re-writing the DHRM policy. The Hearing Officer lacks the authority to re-write DHRM policy. Although it may be the case that had DHRM been aware of a factual situation similar to Grievant's case, it may have drafted its policy to include conviction for possession of drug paraphernalia, this is a matter best left to the wisdom of DHRM policy writers.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **rescinded**. The Agency is ordered to **reinstate**⁶ Grievant to his former position or, if his former position is unavailable, to an objectively similar position with all incumbent rights at the time of removal. Grievant is awarded **full back pay** and **full back benefits** from the date of removal less any interim earnings.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

⁶ It is with little enthusiasm that the Hearing Officer is ordering Grievant's reinstatement. The Agency's concerns about Grievant's use of marijuana is understandable. He holds a position of trust with juveniles who may be incarcerated for offenses including drug possession. Testimony at the hearing revealed that the Agency can closely monitor and test Grievant regarding drug use. Grievant should expect that the Agency may choose to take these actions upon his return to employment.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar days** of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5437-R

Reconsideration Decision Issued: June 17, 2002

DISCUSSION

On June 10, 2002, the Agency requested reconsideration of the Hearing Officer's decision dated May 31, 2002. In that decision, the Hearing Officer reversed the Agency's discipline and reinstated Grievant. The Agency raises several objections to the Hearing Officer's decision.

1. Conduct Unbecoming A State Employee.

Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." Although DHRM Policy 1.60, *Standards of Conduct*, lists examples of Group III offenses, that list is not all-inclusive.⁷ It is possible for an employee to engage in behavior not listed as a Group III offense, yet the employee is held responsible for his or her behavior.

In order to discipline Grievant, the Agency created the offense of conduct unbecoming a State employee.⁸ The question becomes whether the Agency can discipline Grievant under DHRM Policy 1.60, *Standards of Conduct*. To answer this

⁷ P&PM § 1.60(V)(A) states,

The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgment of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.

⁸ If Grievant had been convicted of possession of marijuana, it would have been unnecessary for the Agency to create the offense of conduct unbecoming a State employee. It could have relied on DHRM Policy 1.05 to discipline Grievant.

question, it is confusing to use the phrase “conduct unbecoming a State⁹ employee.” It is conceivable that almost any negative behavior could be conduct unbecoming a State employee thereby justifying disciplinary action under the DHRM Policy 1.60. In reality, the Agency disciplined Grievant not for conduct unbecoming a State employee, but disciplined him for possession of marijuana outside of the workplace without being convicted for possession of marijuana.

DHRM policy writers have considered how to discipline State employees using alcohol or other drugs. DHRM formulated Policy 1.05, *Alcohol and Other Drugs*, to address this subject matter. A review of this policy, reveals several conclusions. First, DHRM policy writers have extensively reviewed and considered the “adverse effects of alcohol and other drugs.”¹⁰ Second, DHRM policy writers have determined what behavior constitutes a violation of the *Alcohol and Other Drugs* policy. Third, DHRM Policy 1.05 makes a distinction between possession of illegal drugs¹¹ in the workplace and possession of illegal drugs outside of the workplace. If possession of an illegal drug occurs outside of the workplace, a criminal conviction for violating a criminal drug law¹² is necessary before the policy is violated. Fourth, DHRM Policy 1.05 specifically acknowledges DHRM Policy 1.60, *Standards of Conduct* as the mechanism to implement discipline for violation of Policy 1.05.

Given the facts of this case, Grievant’s behavior would have been contrary to DHRM Policy 1.05 if he both possessed marijuana outside of the workplace and was convicted of possession of marijuana. Grievant was not convicted of possession of marijuana, and, thus, his behavior was not sufficient to trigger disciplinary action under DHRM Policy 1.05.

There is no reason for the Hearing Officer to believe that DHRM intended to permit employees using alcohol and other drugs to be disciplined under DHRM Policy 1.60, *Standards of Conduct*, differently from the way employees are to be disciplined under DHRM Policy 1.05, *Alcohol and Other Drugs*. In essence, the Agency is asking the Hearing Officer to uphold disciplinary action against Grievant for his possession of marijuana outside of the workplace even though DHRM Policy 1.05 requires a conviction of the possession of marijuana before disciplinary action may be taken under DHRM Policy 1.05.

⁹ It is inconsistent for the Agency to attempt to discipline Grievant for conduct unbecoming a State employee yet argue that Grievant should be held to a higher standard than other State employees are held to because he is a Juvenile Correctional Officer entrusted with the supervision of juvenile offenders.

¹⁰ P&PM § 1.05(Objective).

¹¹ The policy uses the term “Controlled drug.”

¹² A conviction for possession of drug paraphernalia is not conviction of a criminal drug law under DHRM Policy 1.05. This policy defines criminal drug law as “Any criminal law governing the manufacture, distribution, dispensation, use, or possession of any controlled drug.” Drug paraphernalia is not a drug, and, thus, possession of drug paraphernalia is not a possession of a controlled drug as defined by the policy.

This Hearing Officer adopts the philosophy of judicial restraint. In other words, the Hearing Officer will not create new policies or re-write existing policies. The reason for this is simple – the Hearing Officer does not have the authority to do so and even if the Hearing Officer had the authority to change policy, the Hearing Officer does not possess the breadth of knowledge and wisdom necessary to formulate policy for the Commonwealth of Virginia. Policy writing is best left to the expertise of staff at the Department of Human Resource Management. If the Hearing Officer were to conclude that Grievant’s behavior should be disciplined, then the Hearing Officer would be re-writing DHRM Policy 1.05 to permit discipline of an employee who is convicted of possessing drug paraphernalia outside of the work place. The Hearing Officer will not do so.

2. Exclusive Right to Manage

The Agency contends that the Hearing Officer’s decision “infringes upon this agency’s statutory right to manage its affairs.” In essence, the Agency argues that the Hearing Officer is bound by the Agency’s exclusive right to manage its affairs including its interpretation of DHRM policy.¹³

A Hearing Officer’s authority is firmly rooted in law and policy.¹⁴ The Agency misconstrues its “statutory right to manage.” The focus of the “exclusive right” is on qualification of grievances and not on grievance hearings.

Right to Manage. Va. Code § 2.2-3004(B) states:

Management reserves the exclusive right to manage the affairs and operations of state government. Management shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing, management’s response, including any appropriate remedial actions, shall be prompt, complete, and fair.

¹³ The Department of Juvenile Justice is applying DHRM policy and not its own policy. Thus, the Agency is not entitled to any deference in its interpretation of DHRM policy.

¹⁴ It is important to remember that grievance hearings involve property rights protected by the United States Constitution and the Virginia Constitution. A nonprobationary classified employee has a valid property interest in continued employment as a State employee. Leftwich v. Bevilacqua, 635 F. Supp. 238, 240 (1986). Once that property interest is created, its removal is governed by the Due Process Clause of the Virginia and U.S. Constitutions, and not by Virginia statutes or regulations. Id. at 241.

“Virginia law requires four basic elements in a post-termination grievance hearing. These requirements include: (1) written notice of the termination with reasons therefor; (2) a hearing before an impartial three-member panel; (3) an opportunity to present, examine, and cross-examine witnesses; and (4) a panel decision that adheres to ‘law and written policies.’” Id. at 242.

This section does not define the word “exclusive.” Black’s Law Dictionary (6th Ed.) defines exclusive as:

Appertaining to the subject alone, not including, admitting, or pertaining to any others. Sole. Shutting out; debarring from interference or participation; vested in one person alone. Apart from all others, without the admission of others to participation.

Ambiguous Interpretation. The Agency interprets *Va. Code § 2.2-3004(B)* to prevent the Hearing Officer from interfering with the discipline¹⁵ taken against one of its employees. If the Agency’s interpretation is correct, then *Va. Code § 2.2-3004(B)* is ambiguous.¹⁶ On the one hand, the General Assembly has created a grievance procedure providing for review by a Hearing Officer. On the other hand, the General Assembly has reserved to management the exclusive right to manage thereby precluding review by a Hearing Officer. These two concepts appear to conflict, if one adopts the Agency’s view.

Origins of the Exclusive Right. In 1978, the General Assembly passed *Va. Code § 2.1-114.5:1*¹⁷ which set forth a grievance procedure. Section B of that statute stated:

Nothing in this procedure is intended to circumscribe or modify the existing management right of any State agency to do the following: (i) direct the work of its employees as well as establish and revise wages, salaries, position classifications and general employee benefits; (ii) hire, promote, transfer, assign and retain employees within the agency; (iii) maintain the efficiency of governmental operations; (iv) relieve employees from duties of the agency in emergencies; and (v) determine the methods, means and personnel by which operations are to be carried on.

In 1979, the General Assembly deleted the above language for *Va. Code § 2.1-114.5:1* and substituted:¹⁸

Management reserves the **exclusive right to manage** the affairs and operations of State government. **Accordingly**, the following complaints are **nongrievable**: (i) establishment and revision of wages or salaries, position classifications or general benefits, (ii) work activity accepted by the employee as a condition of employment or work activity which may reasonable be expected to be a part of the job content, (iii) the contents of

¹⁵ The Hearing Officer assumes without deciding that disciplinary action is management of employees.

¹⁶ If a statute is ambiguous, it is appropriate use legislative history and the rules of statutory construction in order to determine Legislative intent.

¹⁷ 1978 Acts of Assembly, Chapter 845.

¹⁸ 1979 Acts of Assembly, Chapter 734.

ordinances, statutes or established personnel policies, procedures, rules and regulations, (iv) failure to promote except where the employee can show established promotional policies or procedures were not followed or applied fairly, (v) the methods, means and personnel by which such work activities are to be carried on, (vi) termination, layoff, demotion or suspension from duties because of lack of work, reduction in work force, or job abolition, (vii) the hiring promotion, transfer, assignment and retention of employees within the agency, and (viii) the relief of employees from duties of the agency in emergencies. (Emphasis added.)

Webster's New Universal Unabridged Dictionary defines "accordingly" as:

1. therefore; so; in due course.
2. In accordance; correspondingly.

By using the word "Accordingly" in *Va. Code § 2.1-114.5:1*, the General Assembly tied the first sentence granting an exclusive right to the second sentence listing the examples of that exclusive right. Thus, the exclusive right to manage was defined by the examples listed and an employee could not challenge those issues by filing a grievance. *Va. Code § 2.1-114.5:1* preserved the Agency's exclusive right by not permitting an employee to initiate a grievance challenging that right.

In 1995, the General Assembly removed many limitations on what matters could form the basis of a grievance, but retained prior restrictions when determining whether a grievance could qualify for a hearing. In other words, the test for whether an issue violated the Agency's exclusive right to manage was delayed from the beginning of the grievance process to the hearing qualification stage. If an employee filed a grievance listing an issue that encroached on the exclusive right to manage, the employee could take his or her grievance through the step process, but the grievance would not qualify for a hearing before a Hearing Officer. As part of this change, the General Assembly passed *Va. Code § 2.1-116.06* which states:

B. Management reserves the exclusive right to manage the affairs and operations of state government. Management shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing, management's response, including any appropriate remedial actions, shall be prompt, complete, and fair.

C. Complaints relating solely to the following issues shall not proceed to a hearing: (i) establishment and revision of wages, salaries, position classifications, or general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be a part of the job content; (iii) contents of ordinances, statutes or established personnel policies, procedures, and rules and regulations; (iv) methods, means, and personnel by which work activities are to be carried on; (v) termination, layoff, demotion, or suspension from

duties because of lack of work, reduction in work force, or job abolition; (vi) hiring, promotion, transfer, assignment, and retention of employees within the agency; and (vii) relief of employees from duties of the agency in emergencies.

For the most part, *Va. Code § 2.1-116.06* is the same as former *Va. Code § 2.1-114.5:1* except that it divides part of the prior statute into two subsections and adds two new sentences regarding the agency exercising trust and taking remedial actions. There is no reason to believe that the General Assembly intended this change to extend the exclusive right to manage into the Hearing Officer's decision-making authority. Indeed, the third sentence to subsection B shows that that subsection addresses only matters not qualifying for a hearing. It confirms that the General Assembly intended the exclusive right to remain regarding matters not qualifying for a hearing.¹⁹

Although a Hearing Officer always should be mindful that an agency is responsible for managing its business, once a grievance is qualified for a hearing, the issues in that grievance do not encroach on the Agency's exclusive right.²⁰

Conclusion. The focus of an Agency's exclusive right to manage is whether an issue qualifies for a hearing. Once an issue qualifies for a hearing, the Agency no longer has an exclusive right to determine the outcome of disciplinary action. To adopt the Agency's view that its exclusive right governs Hearing Officer decision-making, would be to have the Hearing Officer serve as a "rubber stamp." A grievance hearing would be reduced to the Hearing Officer determining if the employee engaged in behavior justifying even the slightest discipline, and then affirming whatever discipline the Agency issued regardless of how outrageous the discipline may be.²¹ This would be contrary to Legislative intent and serve to deny grievants procedural due process.

3. Reinstatement Prior to Final Court Determination

Grievant had certain conditions attached to his plea agreement. The Agency asks the Hearing Officer to delay Grievant's reinstatement pending his completion of those conditions. This contention fails because once the Hearing Officer reverses disciplinary action involving termination, the Hearing Officer must reinstate Grievant

¹⁹ The exclusive right to manage language appears in subsection B of *Va. Code § 2.1-116.06*. Subsections A through E of that statute address qualification of grievance hearings. Subsection F addresses hearing locations. In contrast, *Va. Code § 2.1-116.07* addresses Hearing Officer decisions, duties, and costs. Isolating the exclusive right in a section dealing with hearing qualification further suggests the exclusive right does not govern Hearing Officer decision-making.

²⁰ One exception to this may be when an Agency mistakenly qualifies for hearing an issue that would otherwise be within its exclusive right.

²¹ The question arises regarding whether anyone could enforce the second sentence in *Va. Code § 3004(B)* stating, "Management shall exercise its powers with the highest degree of trust." The Agency contends it retains and can enforce its exclusive right; but can it also be expected to enforce on itself its obligation to exercise trust?

immediately. The Hearing Officer lacks the authority to attach conditions to or to delay reinstatement.

4. **Subjects the Agency to Legal Liability**

The Agency contends the Hearing Officer's decision "subjects the agency to legal liability." The Agency does not cite any legal authority for its conclusion because there is no such legal authority. This contention is without merit.

5. **Credibility of the Grievance Process**

The Agency contends that the Hearing Officer's decision "undermines the credibility of the grievance process." A Hearing Officer's decision is one piece of a several stage process dedicated to balancing the constitutional rights of employees with the Commonwealth's interest in having a productive and competent workforce. Hearing Officers are hardly infallible. Errors made at any stage of the grievance process, including errors made by Hearing Officers, can be addressed and corrected on appeal to the next step in the process. This Hearing Officer must make decisions based on the facts of each case and the policy applicable thereto without being influenced by the perceptions of particular agencies or employees.

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ..." to grant the request.

Grievant's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. The Agency simply restates the arguments and evidence presented at the hearing. For this reason, the Agency's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer